Supreme Court, U.S.
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No. 91-1993

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONTINENTAL CASUALTY COMPANY,
Petitioner,
v.
FIBREBOARD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF MOTION TO GRANT, VACATE AND REMAND ON GROUNDS OF MOOTNESS

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Several points made in respondent's opposition to petitioner's motion to grant, vacate and remand on grounds of mootness warrant a brief reply.

First, respondent is factually incorrect in asserting that the settlement in *Cimino* was only preliminarily approved. The *Cimino* court has entered a *final* order approving the settlement, and petitioner has begun making payments pursuant to that settlement.[1]

It follows that the issues raised in the petition are moot. Petitioner is fully obligated to pay the sums required by the settlement to the *Cimino* plaintiffs, thus

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[1] Attached here is the *Cimino* district court's Amended Order, dated October 9, 1992. An earlier approval order was withdrawn because of various technical errors in the court's order and findings.

ending the dispute over its liability to indemnify Fibreboard for the damages originally awarded in that case. Fibreboard's third-party complaint against Continental in *Cimino*, in turn, has been dismissed.[2]

It is true that there are other unrelated aspects of the decision below that were not challenged in the petition for certiorari, involving petitioner's liability for damages awarded in West Virginia. We ask only that the Court vacate the part of the Ninth Circuit's decision relating to liability for punitive damages awarded in Texas—the issue raised in the petition.

Finally, there is no merit to respondent's argument that the Court should deny the request to vacate the decision below because the mootness resulted from petitioner's voluntary action in entering into the *Cimino* settlement. As noted in our motion, the Court has followed a consistent practice of vacating and remanding cases that become moot during the pendency of a petition for certiorari. *See* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 434 (arguing against a change in this practice). Moreover, while some circuits follow a different approach where mootness results from a settlement, this Court should not recognize such an exception. *See id.* at 238-41 (Supp. 1992) (criticizing these circuit rulings).

Petitioner, faced with enormous liability as a result of the decision below, reasonably took advantage of an opportunity to limit the damage through the *Cimino* settlement. In so doing, it passed up its opportunity to obtain Supreme Court review of the merits of the Ninth Circuit's decision. There is no justification for requiring a settling party to live with the permanent preclu-

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[2] Out of a class of approximately 2300, there were only three objections to the settlement, one of which was withdrawn. Respondent cites no authority for the proposition that the remote possibility of a successful appeal by the two remaining objectors undermines the mootness of the petition.

sive effects of a decision that has not been subject to the full appellate process in order to reach a settlement while review is still being sought. Such a rule will only deter settlements in pending cases. *See id.*

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-86-0456-CA
(Class Action)

CLAUDE CIMINO, *et al.*

vs.

RAYMARK INDUSTRIES, INC., *et al.*

AMENDED ORDER

[Filed Oct. 9, 1992]

Consistent with the Amended Findings of Fact and Conclusions of Law signed by the court on October 9, 1992, the court, having heard counsel, having considered the objections, and having reviewed all submissions presented with respect to the proposed settlement, and upon the entire record and docket herein, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. The proposed settlement, as provided for by the Settlement Agreement on file, is in all respects fair, adequate, reasonable, and reached in good faith, and is approved.

2. Notice to the class, required by Rule 23(e) of the Federal Rules of Civil Procedure, has been given in an adequate and sufficient manner, complying in all respects with such Rule and due process.

3. Plaintiffs and Continental Casualty Company shall consummate the settlement according to the terms of the Settlement Agreement.

4. The proposed individual payments to the plaintiffs set forth in Attachments A and B to this Order are approved; recognizing the contingencies involved, the court also approves the terms of the settlement whereby plaintiffs may recover amounts less than those individual amounts. The cash payments, which represent 10 percent, 7.535% and 7.533%, respectively, of the total maximum possible settlement, are also approved. These cash payments by Continental will be made proportionate to allocations to pre-1959 plaintiffs as set forth in Attachments A and B. The proposed allocations of the settlement amounts, as set forth in the Amended Findings of Fact and Conclusions of Law are approved. The court notes that the amount of payments to post-1959 claims cannot be set with exactitude at this time due to the effect of the calculation of interest.

5. This Order is a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and the court finds that there is no just reason to delay appeal. The Clerk of Court is directed to enter this Order as a final judgment of this court.

6. The claims of each of the plaintiffs against Fibreboard Corporation are dismissed with prejudice.

SIGNED this the 9th day of October, 1992.

/s/ Richard A. Schell
RICHARD A. SCHELL
United States District Judge